IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/12/2003

CORAM

THE HON'BLE MR.JUSTICE S.ASHOK KUMAR

Crl.R.C.NO.1795 OF 2003 and Crl. R.C.No.1796 OF 2003
and
Crl.M.P.No.11660 and 11661 of 2003

Hariharan ....Petitioner in Crl.R.C.NO.1795/2003

1.Sampath
2.Gunasekaran @ Guna
3.Naraimudi Ganesan @ Ganesan
.....Petitioners in Crl.R.C.No.1796/2003
-Vs-

State by Deputy Superintendent of Police
CB CID, Metro Wing, Chennai
E5 Crime No.986 of 2001
.....Respondent in both Crl.R.Cs.

Criminal Revisions under Section 397 read with 401 of Criminal Procedure Code against the order dated 14.11.2003 passed in Crl.M.P.No.194 of 2003 & 193 of 2003 in S.C.No.87 of 2003 on the file of the Additional District and Sessions Judge, (Fast Track Court No,I) Chennai.

!For Petitioners :Mr.N.Natarajan, Senior Counsel
for M/S.G.Ravikumar & Others

^For Respondent :Mr.I.Subramanian
Public Prosecutor , Assisted by
Mr.M.K.Subramanian, Government Advocate (Crl.Side)

:O R D E R

Criminal Revision Case No.1795 of 2003 has been filed by one Hariharan who is A-2 in the Sessions Case No.87 of 2003 on the file of the Additional District and Sessions Judge (Fast Track Court No.1), Chennai and Accused Nos.11, 16 and 17 in the above S.C.No.87/2003 viz., one Sampath, Gunasekaran @ Guna and Naraimudi Ganesan @ Ganesan have filed Criminal Revision Case No.1796 of 2003.

2. The above four revision petitioners and 14 others are facing trial before the Additional District and Sessions Judge (Fast Track Court No.1) Chennai in S.C.No.87 of 2003. The charges framed against the said accused persons in the above case are as follows:

Charge No. and against whom Offences

1.A1 to A18 120B IPC
2.A4,A7,A10,A11,A14,A15, A16 and A17 365 IPC
A1,A12,A3,A5,A6,A8,A9,A13 and A19 365 r/w 109 IPC
3.A1 to A11, A14 to A18 387 IPC
4.A-12 419, 420 and 387 r/w
109 IPC
5.A3,A4,A6 to A8, A10,A11, A14 to A18 302 IPC
6.A3 to A11, A13 to A18 347 and 364 IPC
A1,A2 & A12 347 r/w 109 &364 r/w 109 IPC
7.A3,A5 to A8, A10,A11 &A13 to A18 201 IPC

The trial of the case started and witnesses P.W.1 to P.W.9 have been examined. P.W.10 Venugopal was examined by the prosecution in chief. According to the petitioners, a plain reading of the chief examination of P.W.10 Venugopal clearly established that he participated in the alleged crime from the beginning to the end and thereafter he absconded for nearly four months and subsequently he appeared on 1.5.2001 before the respondent who in turn recorded his statement under Section-161 Cr.P.C. As per his evidence in Court, he was fully aware of the object of the conspiracy and other allied offences committed by himself and other persons. His evidence further reveals that he procured the premises for the commission of the crime, provided his household articles in the premises for commission of the crime, gave his car on hire to the accused persons, financed to the alleged accused persons, witnessed the deceased who was chained in that premises, witnessed the body of the deceased, booked rooms in his name in the hotels for stay of the accused persons and paid the hotel bills which will categorically establish that PW10 Venugopal is a "particepes criminis" (a partner in crime). The respondent is fully aware that PW10 Venugopal is one of the co-accused in the alleged crime but for the reasons best known to them, he was not arrayed as an accused in the case. The respondent relied upon the said witness's self-incriminating statement recorded under sections 161 and 164 Cr.P.C., and cited him as witness in the charge sheet. If the respondent wanted to examine the said person as a witness, the respondent ought to have given a requisition to the Chief Metropolitan Magistrate, Chennai to record his confession under Section-164 Cr.P.C., and take him as an approver as contemplated under sections 306 and 308 Cr.P.C., But the respondent himself has acted as a Court and tendered pardon to the said person Venugopal and cited him as a prosecution witness to prove the case against the petitioners herein and others. In such circumstances, the petitioners filed petitions under Section-319 of Cr.P.C., before the learned Judge to implead witness P.W.10 Venugopal as accused in this case.

3. The respondent filed a counter wherein the respondent contended as follows: Whatever PW-10 has done in this case, he has done it for commission or to oblige A9 to get some big post in ADMK , that there are no materials as of now to hold tha one of the coconspirators or actively participated with any mensrea. According to the respondent since P.W.10 is only a witness, there is no need to follow the procedure under Sections 305 to 308 Cr.P.C., Because of the proviso to Sec.132 of the Indian Evidence Act, Section 319 Cr.P.C., cannot be resorted to placing a man on trial on his own evidence which is contrary to the traditions of justice in criminal courts. There is no other evidence as on date to show that PW10 is a co-conspirator or partner in crime, as the answers given by PW10 is protected under the proviso to Section 132 of the Indian Evidence Act and the same cannot be used as an item of evidence against him. These petitions have been filed only to protract the proceedings.

4. The learned trial Judge dismissed the said petitions on the ground that PW10 cannot be treated as a co-conspirator or active partner in the crime and his evidence is protected by the proviso to Sec.132 of the Indian Evidence Act. Aggrieved against the said order, the petitioners herein have preferred these Criminal Revision Cases.

5. Mr.N.Natarajan learned Senior Counsel appearing for the petitioners would contend that the overt acts committed by P.W.10 Venugopal as disclosed in the chief examination of the said witness, indicate an agreement to do certain things in pursuance of the conspiracy with the other co-accused and that he has neither reported to the police about the illegal acts committed by the co-accused nor did he disassociate from them. According to the learned senior counsel, P.W.10 himself is a co-conspirator and a conspirator need not know all the material facts of the conspiracy from top to bottom and he could not be taken as a witness without the interference of a judicial mind and therefore he should also be arrayed as a co-accused alongwith the other 18 accused in the trial as contemplated under Section 319 Cr.P.C.,

6. A perusal of the deposition in Chief Examination of P.W.10 would reveal that he procured the premises, a Semiya Company, in which he was a partner, for the commission of the crime, provided his household articles in the said premises to facilitate the commission of the crime, gave his car on hire to the accused persons, paid Rs.1,10,000/- to the accused persons, witnessed the deceased being chained in that premises, witnessed the body of the deceased being carried from the upstairs to the` ground and having booked rooms in his name in the hotels for the stay of the accused persons before and after the commission of the offence, all of which according to the learned senior counsel, would be sufficient to arraign him as partner in the crime. A perusal of his evidence would show that till his meeting with A3 Manickam, who declared that they are going to kidnap M.K.Balan the former MLA, he might have acted innocently to help a friend. But, after the declaration by A3 that they are going to kidnap M.K.Balan to extract money and after seeing A3 giving money of Rs.100/- to purchase a chain to tie the deceased in his premises and after the declaration by A3 that they have already kidnapped M.K.Balan and

after himself seeing the deceased tied to the cot by chain and also after he arranged hotels for the stay of some of the accused A1, A2 and A12 (wife of A2), for which he has paid Rs.15,000/- in cash and also Rs.15,000/- by cheque, he could not be called as a mute spectator, but atleast a tool in the hands by the accused.

7. P.W.10 had no motive towards the deceased or expected any wrongful gain from the deceased. The motive for acting as a tool in the hands of the accused may be that he wanted to get some big post in the ruling party either through A3 or A9. The acts mentioned above may not be in pursuance of a conspiracy hatched earlier. However, it is open to the trial court to come to the conclusion after his evidence is completed by cross examination of the said witness, whether P.W.10 had any role to play in the conspiracy or abetment of the crime or partner to the crime itself.

8. Therefore, now the point to be considered is whether P.W.10 should be added as an accused under section 319 Cr.P.C., or not.

9. The Point:
Sec.319 of Cr.P.C. reads as follows:
"319. Power to proceed against other persons appearing to be guilty of offence-
(1) Where in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
(4) Where the Court proceeds against any person under sub-section(1), then-
(a) the proceedings in respect of such person shall be commenced afresh and the the witness re-heard:
(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

Old Section-351 of Cr.P.C. has been included as Section 319 (3)&(4) of the Present Code. The fact that any new person can be arrayed as accused alongwith the accused facing trial, if the court comes to the conclusion that the said person also might have committed the offence is not in dispute. But, such a procedure has to be sparingly used in extraordinary circumstances only since Section-319 Cr.P.C., is really an extraordinary power conferred on the court. There is no dispute of this aspect between both the sides.

10. Now, the point to be considered is, whether P.W.10 is protected by proviso to Sec.132 of the Indian Evidence Act and whether P.W.10

should be added as an accused by invoking Section 319 of Cr.P.C., The judicial opinions were not unanimous with regard to the protection to be given to a witness under the proviso to Section-132 of the Indian Evidence Act. Section-132 of the Evidence Act reads thus:

"132.Witness not excused from answering on ground that answer will criminate- A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso- Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

The decisions reported in-

1) In Re.Gopal Das (1881) ILR 3 Madras 271

2) Padabba Reddi Vs. Iyyala Yarada Reddi (AIR 1929 Madras 236, (1929)(3) Crl.LJ 613)

3) Emperor Chaptur Singh ILR 43 All 92 (AIR All 362) 4) Shree Kumaran Lal Vs. Bandi Prasad (AIR 1943 Patna 17 (1943)(44) Crl.L.J.391) and

5) Bai Shanta Vs. Umraq Amir (AIR 1926 Bombay 1926 (27) Crl.L.J.423) FB)

would show that the judicial opinions were not unanimous with regard to the protection of witnesses under the proviso of Sec.132 of the Indian Evidence Act. The controversy has been set at rest by the decision of the Supreme Court reported in Delhi Administration Vs.Jagit Singh (AIR 1989 SC 598 (1989 Crl.L.J.986), the Supreme Court has held as follows:

"Therefore, a witness is legally bound to answer any question which is relevant to the matter in issue even if the answer to such question is likely to criminate him directly or indirectly. Proviso to S.132 expressly provides that such answer which a witness is compelled to give shall not subject him to any arrest or prosecution nor the same can be proved against him in any criminal proceeding except prosecution for giving false evidence by such answer. The provisions of proviso to S.132. Evidence Act, clearly protect a witness from being prosecuted on the basis of the answers given by him in a criminal proceeding which tend to criminate him directly or indirectly."

Earlier to that decision, in the decision reported in Kunappan Vs. State of Kerala (1987 (2) Kerala L T 222), Thomas,J., (As His Lordship then was) held that-

" a voluntary statement made by a witness may stand on a different footing and the answers given by a witness either to questions put up by the court or by the counsel on either side cannot be said to be voluntary statements made by him and that it is immaterial whether he objects to the question or not. In a case where a party to a civil litigation gives evidence. It is possible to presume that he gives the evidence on his own according similarly. If then accused in a criminal case offers himself to be examined as a witness, a presumption may arise that the evidence given by him

is voluntary. That would not be the position with regard to the evidence given by a witness summoned by the court. The answer given by a witn ess in a court either by issuance of summons or by other means can not be equated with the answer given by a party in a civil litigation or the statement of an accused as a witness, in a criminal case. The answer given by such a witness cannot be characterized as a mere voluntary statement and without any compulsion. Petitioner has not voluntarily adduced evidence before the court. Only on summons he appeared and testified. This is a case where he has been compelled to answer the question. Left to himself, he would not have come before the court to depose. A situation in which a witness is placed when he is examined before a court of law cannot be lost sight of. When a person is examined as a witness his natural feeling is that he has to answer the questions. If during the course of the testimony he gives answer criminating himself, he can really look forward to the protection under the proviso."

The said Judgement of the Supreme Court has been followed in a Division Bench Judgement reported in M.P.Gandharan Vs. State-S.I of Police (1989 Crl.L.J.2455) wherein the Division Bench has also held that a witness who was summoned as D.W.1 who gave incriminating answers is clearly protected under the proviso to Sec.132 of the Evidence Act.

11. In the decision reported in L.Chordia Vs. State of Maharastra (AIR 1968 SC 938) it has been held as follows:

"Where a person, who acted as a carrier in a conspiracy to smuggle gold in India, admitted her role in the statements made to the Customs Officials investigating the case under the Sea Customs Act but, instead of being included in the array of accused and sent up for trial, was examined as a witness against her former associates and that, there could be, no doubt, that she was a competent witness. Being selfconfessed criminal, her evidence was accomplice evidence and, if subjected to scrutiny and the usual checks for corroboration, must be held to be received with due caution."
And that,
"No pardon could be tendered to such a witness because the pertinent provisions of Criminal P.C.did not apply. Nor could she be prevented from making a disclosure, if she was so minded. The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. She was protected by Sec.132(proviso) of the Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence."
Therefore it is clear that a person who gave incriminating answers when examined as witness on the summons from court, cannot be prosecuted on his own evidence unless there are other evidence to show that he is a partner in the crime.

12. The decisions referred to by the petitioner reported in-
(1) Smt.Rukhsana Khatoon Vs. Sakhawas Hussain (2002
(2) Crimes 5 5 (SC) and
(2) Rakesh Vs. State of Haryana (2001 (3) Crimes 330 (SC)
are cases in which the person or persons who were named as accused in FIR were

not charge sheeted, but during the trial there appeared sufficient evidence indicating involvement of such accused and on that score they were arrayed as accused by the trial court.

13. The decision reported in Jai Prakash Vs. State of U.P. (1985 (1) 229, is also a case which deals with the power of the court for application of the proviso to Sec.319 Cr.P.C. and deals with the question whether the court can take cognizance of the offences without resorting to Sec.193 and 209 of Cr.P.C. after committal to the court of Sessions. I have already mentioned that Sec.351 Cr.P.c., of the old Code has now been incorporated in Sec.319 Cr.P.C.

14. In the decision reported in Bhagat Dolia Vs. State (1977 Crl.L.J.617) such a situation is dealt with, in which this court held as follows:(Para4&5)

"4. Mr.C.K.Venkatanarasimhan, the learned counsel for the petitioner invited my attention to several portions of the evidence of Srinivasan where he has admitted that he had signed several tenders in the names of other persons and those tenders were eventually sent to the Ennore Thermal Scheme Authorities for consideration alongwith the Tenders submitted by the petitioners. The learned counsel, therefore, says that on his own admission, the witness stands self-condemned and, therefore, the Special Judge should have unhesitatingly treated him as a conspirator and an offender and ranged him along with the other accused in exercise of his powers under Section 351 (1)of the Criminal Procedure Code. Appealing as the argument sounds, I am afraid the contention of the petitioners cannot be accepted. Section 351 has been provided in the Code with a design and purpose and for effective administration of justice. The framers of the Code did not want the court to feel helpless when it found that the prosecution had laid chargesheet only against some persons concerned in an offence and had left out some others either intentionally or unintentionally. To deal with such a situation, the Legislature has given powers to the Court under Section 351 to set right matters and bring to trial all persons who appeared to have a hand in the commission of the offence. Therefore, the question of exercising its powers under Section 351 of the Code is purely on the Court and in order to exercise the powers, it is the Court which will have to objectively satisfy itself that the evidence or the circumstances in a case warrant a person not brought up for trial also being detained and made to face the trial. It is in that perspective the contention of the petitioners in the instant case has to be considered. No doubt, Srinivasan has admitted in several places in his evidence that he had signed bogus tenders in the names of several persons. But on that score alone, it cannot be said that he must also be treated on the same footing as the other accused in case. Srinivasan's evidence read as a whole makes it appear that he was not a co-conspirator with the other accused but on the other hand, he was only a tool in the hands of the first petitioner. As such, he cannot be said to have had any part in the commission of offences under Sections 120-B, 420 and 471, Indian Penal Code. At least the charge that can be levelled against him is that he committed an offence of forgery punishable under Section 465, Indian Penal Code. But even for charge of forgery it must be proved that the false document was made with a particular animus, ie., to cause damage or injury to the public or to any

peson, or to support any claim or title, or to cause any person to part with property etc., etc., Unless, therefore, the evidence disclose that Srinivasan had signed the several bogus tenders with dishonest and thereby had necessary mens rea, it is not possible to hold that he had committed even the offence of forgery. Whatever it be, it is for the Court to feel satisfied about the circumstances of the case and conclude that the interests of justice require action being taken against a witness or any other person under Section 351, Criminal Procedure Code. Merely because the petitioners contend that the evidence given by Srinivasan stamps him unmistakably as a co-accused, the Court is not bound to accede for their request and take action under Section 351, Criminal Procedure Code.

5. There is also another aspect which has to be borne in mind.

The object of Section 351 is to see that all persons concerned in an offence of which cognizance had been taken by the Judge or magistrate are effectively dealt with and no one is allowed to escape the long arm of law merely because the prosecution had failed to array him as an accused. While doing so, the Court must also see that in its anxiety to effectively administer justice, it does not indirectly contribute to the obliteration of evidence against the main offenders in the case. In the instant case, if Srinivasan is also to be arrayed as an accused, then it is quite likely that the prosecution may not have any other evidence against the petitioners and the other two accused as regards the preparation of false tenders and the dishonest treatment of those tenders as genuine by accused 1 and 2. In P.Sirajuddin Vs. The State of Madras, AIR 1971 SC 520 (at p.529) = (1971 Crl LJ 523) it was observed by the Supreme Court as follows:

"In our view, if it be a fact that it was the appellant who was the head of the department actively responsible for directing the commission of offence by his subordinates in a particular manner, he cannot be allowed to take the plea that unless the subordinates were also joined as co-accused with him the case should not be allowed to proceed."

Therefore, the Court while exercising its powers under Section 351, has a duty to see that in its attempt to bring all offenders to justice, its action does not become a self-defeating one."

In the said case, the action of the Magistrate in refusing to transpose P.W.12 Srinivasa on giving evidence incriminating himself that he prepared tenders in the name of different concerns and he signed some of those tenders to make it appear that the tenders have been signed by the proprietors or managers of those respective concerns, as accused in that case was upheld by this court.

15. In the decision reported in A.R.Antulay Vs. R.S.Nayak (AIR 1988 SC 1531), a Constitution Bench of the Supreme Court has held as follows:(Para-120)

"120. Before going into these challenges, it is necessary to say something on the merits of the order under appeal itself. An accused person cannot assert any right to a joint trial with his co-accused. Normally it is the right of the prosecution to decide whom it prosecutes. It can decline to array a person as a co-accused and, instead examine him as a witness for the prosecution. What weight is to be attached to that evidence, as it may smack of the testimony of a guilty partner in crime, is a different matter. Prosecution can enter Nolle prosequi against any accused-person. It can seek to withdraw a charge against an accused person. These propositions are too

well settled to require any further elaboration. Suffice it to say that the matter is concluded by the pronouncement of this Court in Laxmipat Choraria v. State of Maharashtra, (1969) 2 SCR 624 : (AIR 1968 SC 938) where Hidayatullah,J. referred to the argument that the accomplice, a certain Ethyl Wong in that case, had also to be arrayed as an accused and repelled it, observing (at p.942-943 of AIR) :
" ... Mr.Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks S.132 (proviso) ".

" .... The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was prosecuted by S.132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence .... "

16. As far as this case is concerned, if the alleged selfincriminating evidence of P.W.10 who is sought to be arraigned as accused is eschewed, there is no other evidence to connect him with the crime. More so, if his evidence is eschewed, there may not be any acceptable evidence as against the other accused who are facing trial. It is also pertinent to note that if P.W.10 is joined alongwith the other accused to face trial, the whole case may fall for lack of evidence. No-one should be allowed to escape the long arm of law merely because the prosecution has failed to array one person as an accused. While doing so, the Court must also see that in its anxiety to effectively administer justice, it does not indirectly contribute to the obliteration of evidence against the main offenders in the case. In the instant case, if P.W.10 is also to be arrayed as an accused, then it is quite likely that the prosecution may not have any other evidence against the petitioners and the other accused as regards the perpetration of the crime. Therefore, the court while exercising its powers under Section-319 Cr.P.C., has a duty to see that in its attempt to bring all offenders to justice, its action does not become a self-defeating one.

17. Normally a person who has a part in the crime is tendered pardon and treated as an approver by resorting to the provisions of Section 302 and 308 of Cr.P.C., An approver is a man of worst character, who has thrown to wolves his erstwhile friends and associates for the purpose of saving his own skin and he is a criminal who has purchased liberty by betrayal. Whether P.W.10 was a partner of the crime or was only a tool in the hands of the other accused, has to be decided by the trial court after his cross examination is over and the evidence of the other witnesses is completed. If the trial court feels that he has taken an active part in the commission of the offence, then his evidence will stand the same footing as that of an approver and as rightly held in the decision reported in L.Chordia Vs. State of Maharastra (AIR 1968 SC 938), the evidence of P.W.10 should be received with caution necessary in all accomplice evidence. To sum up, the incriminating evidence of P.W.10 is protected under the proviso to Section-132 of the Indian Evidence Act, and if the trial court after completion of the evidence feels that he is also a co-conspirator or a partner of the crime,

then his evidence should be viewed with usual caution as in the case of the evidence of an approver. Hence, the above revisions are liable to be dismissed. Accordingly both the revisions are dismissed.

Index:Yes.
Internet:Yes.

To

1.Additional District & Sessions Judge,
(Fast Tract Court-I), Chennai.

2. Deputy Superintendent of Police
CB CID, Metro Wing, Chennai
E5 Crime No.986 of 2001

3.The Public Prosecutor, High Court of Madras, Chennai-104.